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PROTECTIVE ORDERS AND COMMERCIAL INFORMATION—IS GOOD CAUSE GOOD ENOUGH?

The issuance of protective orders pursuant to rule 26(c)(7) of the Federal Rules of Civil Procedure¹ is predicated upon a moving party's demonstration of good cause.² Traditionally, motions seek-

¹ FED. R. CIV. P. 26(c)(7). Rule 26(c)(7) provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may . . . order . . . (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way

Id. Rule 26(c)(7) gives the court the power to control the use of the materials discovered, Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pretrial Discovery Process*, 14 NEW ENG. L. REV. 1, 7-8 (1978), and counterbalance the trial court's inability to limit significantly the scope of discovery, *see* FED. R. CIV. P. 26(b)(1); *see also* Dore, *supra*, at 6 (rules anticipate discovery without judicial supervision). *But cf.* Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766, 767 n.7 (in the course of discovery, parties will often be compelled to disclose confidential information).

District courts have attempted to comply with the Supreme Court's directive that discovery be liberal, *see* *Hickman v. Taylor*, 329 U.S. 495, 506 (1947), by compelling discovery of most materials and by protecting the disclosing party's interests with a protective order, Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 7 (1983); *see In re Halkin*, 598 F.2d 179, 208 (D.C. Cir. 1979) (Wilkey, J., dissenting) (rule 26(c)(7) enables district courts to protect parties from abuse of discovery); *see also* *Textured Yarn Co. v. Burkart-Schier Chem. Corp.*, 41 F.R.D. 158, 160 (E.D. Tenn. 1966) (court has broad discretion to grant protective orders); *Ledge Hill Farms, Inc. v. W.R. Grace & Co.*, 6 FED. R. SERV. 2d (Callaghan) 715, 716-17 (S.D.N.Y. 1962) (disclosure of trade secrets limited to litigation purposes). Protective orders allow discovery to proceed efficiently with a minimum amount of dispute over whether allegedly confidential materials are discoverable. *See* Note, *Modification of Protective Orders: Balancing Practical Considerations and Addressing Constitutional Rights*, 14 SUFFOLK U.L. REV. 1011, 1036 (1980).

The broad scope of discovery permitted by the federal rules is intended to facilitate the flow of communication between litigants. Comment, *supra*, at 767 & n.7. The primary goal of the federal rules is to shift the focus from complicated pleadings to extensive discovery accompanied by simple notice pleading, thereby enhancing the pretrial preparation. *See* Dore, *supra*, at 2; Montgomery, *Changes in Federal Practice Resulting from the Adoption of the New Federal Rules of Civil Procedure*, 1 F.R.D. 337, 346-47 (1941). The only limitation placed upon the scope of discovery is that the information be unprivileged and relevant to the subject matter of the claim. FED. R. CIV. P. 26(b)(1).

² FED. R. CIV. P. 26(c); 4 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* § 26.68, at 26-491 (2d ed. 1983). The party moving for a protective order carries the burden of proving good cause. *See* *Kiblen v. Retail Credit Co.*, 76 F.R.D. 402, 404 (E.D. Wash. 1977). What must be proved in order to carry this burden will depend largely upon the circumstances

ing these orders have been evaluated by balancing the moving party's expectations of confidentiality against the opposing party's expectations of use.³ Recent decisions, however, have injected a constitutional analysis into this traditional good cause test by examining both the moving party's fourth amendment right of privacy and the opposing party's first amendment right of free ex-

and whether the moving party seeks to limit the scope of discovery, or simply to restrict the use of discovered materials. See *In re Halkin*, 598 F.2d 176, 210-11 (D.C. Cir. 1979) (Wilkey, J., dissenting); Note, *supra* note 1, at 1013 (issuance of protective order is discretionary). Good cause under rule 26(c) is established by demonstrating that unrestricted discovery or use of discovered materials will cause the moving party "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c); see *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 249, 654 P.2d 673, 686 (1982), *aff'd*, 104 S. Ct. 2199 (1984). The district court has discretion to decide whether good cause has been shown and usually requires a specific factual demonstration that serious harm will result without the order. See *In re Halkin*, 598 F.2d at 210; Comment, *supra* note 1, at 771. Mere conclusory allegations of harm are insufficient. See *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y. 1971); *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 18 F.R.D. 318, 321-22 (S.D.N.Y. 1955).

Trade secrets and business and commercial information have been traditionally entitled to protection from disclosure during litigation and have usually established the required showing for good cause. See *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969); cf. RESTATEMENT OF TORTS § 759 (1939) (tort cause of action for misuse of business information).

³ See *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969); *United Airlines, Inc. v. United States*, 26 F.R.D. 213, 217 (D. Del. 1960). Seeking to protect confidential commercial information, the moving party may assert a valid expectation of commercial privacy. See *supra* note 2. Similarly, the opposing party's right of access to discovery materials is conditional; the federal rules authorize the issuance of orders limiting this right to exclusive use in connection with trial preparation. See *In re Halkin*, 598 F.2d 176, 207 (D.C. Cir. 1979) (Wilkey, J., dissenting). But see Comment, *In re San Juan Star: Discovery and the First Amendment*, 34 BAYLOR L. REV. 229, 229-30 (1982) (litigant has valid interest in publicizing his suit). The opposing party's expectation of extrajudicial use of the discovered materials is frequently disappointed since many judges often issue protective orders *sua sponte* as a condition of compelling discovery. See *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 971 (3d Cir. 1982); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424, 425 (E.D.N.Y. 1983). An opposing party may be motivated by a desire to use the discovered materials extrajudicially to affect the outcome of the trial, but such use cannot be deemed an expectation worthy of protection. See Marcus, *supra* note 1, at 63. The party contesting the protective order normally has little first amendment interest in the dissemination of the information obtained through the discovery process. *Id.* at 65. Once the discovered material is used at trial, however, the moving party's confidentiality interests in it are lost. See, e.g., *Davis v. Romney*, 55 F.R.D. 337, 344 (E.D. Pa. 1972) (information used at trial becomes part of public record); see *National Polymer*, 641 F.2d at 424.

In determining whether good cause exists, courts have also given consideration to the purposes underlying the discovery provisions, such as the narrowing of issues, the obtainment of evidence, and the need for adequate pretrial preparation. See *Berry v. Haynes*, 41 F.R.D. 243, 244 (S.D. Fla. 1966).

pression.⁴ Courts also have begun to recognize that corporations enjoy a constitutional right of privacy.⁵ Determining whether to grant a rule 26(c)(7) protective order therefore triggers a complex judicial balancing of conflicting constitutional rights.⁶

This Note will focus upon the potential constitutional clash between the right of privacy and freedom of expression that may

⁴ See *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2205-08 (1984); *In re San Juan Star Co.*, 662 F.2d 108, 113-18 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176, 186-91 (D.C. Cir. 1979). Until recently, the *Halkin* decision generally was regarded as the keynote decision in the constitutional treatment of discovery. See Marcus, *supra* note 1, at 2-3. According to the *Halkin* tripartite test, before a district court may issue a protective order: "[1] the harm posed by dissemination must be substantial and serious; [2] the restraining order must be narrowly drawn and precise; and [3] there must be no alternative means of protecting the public interest which intrudes less directly on expression." *Halkin*, 598 F.2d at 191. In addition, the district court must make extensive findings of fact on each of these three elements. *Id.* at 192.

The *Halkin* analysis rests on the premise that, absent a protective order, the federal rules permit unlimited use of discovered information. *Id.* at 188. Unquestionably, protective orders are intended to restrain expression. See Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1645 (1980); Comment, *supra* note 1, at 772. There is concern that protective orders are substantially similar to constitutionally violative prior restraints in that both protective orders and prior restraints of expression are ruled upon before publication and are directed at particular parties. See Note, *supra*, at 1651. Arguably, protective orders are the same in form as prior restraints, yet lower courts that have found a first amendment question implicit in protective order review have not been in agreement on whether protective orders prohibiting dissemination of discovered information constitute prior restraints. Comment, *supra*, note 1, at 773-78; see *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) (dictum) (asserting waiver of first amendment rights); *International Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (acknowledging possibility of first amendment right but avoiding issue); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 204-05 (S.D.N.Y. 1977) (protective orders normally constitute prior restraint). The Supreme Court, however, has indicated that protective orders should not be subjected to the strict scrutiny with which prior restraints are generally reviewed. See *Seattle Times*, 104 S. Ct. at 2207.

⁵ See *G.M. Leasing Co. v. United States*, 429 U.S. 338, 353 (1977); *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968); See *v. City of Seattle*, 387 U.S. 541, 544-45 (1967). The corporate constitutional right of privacy, which is based upon the fourth amendment guarantee of freedom from unreasonable searches and seizures, was first recognized in 1906. See *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *infra* notes 55-59 and accompanying text.

⁶ Cf. *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 316, 187 Cal. Rptr. 4, 6 (1982) (court weighed individual asserted right of privacy under California Constitution against need for discovered information); *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979) (court considered public interests in discovery process and first amendment interests in unfettered expression). Cases reviewing protective order motions from a constitutional perspective illustrate the complexity of such review. See *supra* note 4. It is suggested that the juxtaposition of two conflicting constitutional rights that requires every district court reviewing a rule 26(c)(7) motion to engage in two constitutional rulings is antithetical to the principle of avoiding constitutional adjudication whenever possible. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (matters should be resolved without constitutional ruling if possible); see also *infra* notes 74-79 and accompanying text.

arise under recent protective order jurisprudence. The validity of the assertion that corporations are entitled to a constitutional right of privacy will be examined and the continued application of a constitutional analysis to a litigant's desire freely to express discovered information will be criticized. Lastly, this Note will suggest the inappropriateness of superimposing a constitutional analysis on protective order litigation and will propose a simplified judicial approach to rule 26(c)(7) motions.

THE DEVELOPMENT OF CONSTITUTIONAL SCRUTINY OF PROTECTIVE ORDERS

Until recently, rule 26(c)(7) motions were resolved solely by applying a good cause test that did not encompass an analysis of constitutional rights.⁷ Privacy expectations were based solely on the common-law notion that trade secrets revealed during litigation merit judicial protection.⁸ In *Textured Yarn Co. v. Burkart-Schier Chemical Co.*,⁹ an action for misappropriating trade secrets gave rise to a motion for a protective order to prevent the secrets from being publicly disseminated.¹⁰ The court granted the motion in light of business factors and commercial fairness without addressing corporate expectations of a constitutional right of privacy.¹¹ Similarly, in *United States v. International Business Machines Corp.*,¹² the Federal District Court for the Southern District of New York evaluated the severity of the business injury that the movant would suffer from disclosure¹³ in denying a motion for con-

⁷ See *United States v. International Business Mach. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975); *Textured Yarn Co. v. Burkart-Schier Chem. Corp.*, 41 F.R.D. 158, 160 (E.D. Tenn. 1966).

⁸ See *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969); *supra* note 3; cf. RESTATEMENT OF TORTS § 759 (1939) (tort cause of action for misuse of business information). Traditionally, courts have applied one of three legal theories in protecting confidential commercial information: (1) the existence of property rights in the information, see *Tabor v. Hoffman*, 118 N.Y. 30, 37, 23 N.E. 12, 13 (1889); (2) the presence of a contractual agreement prohibiting disclosure, see *Westervelt v. National Paper & Supply Co.*, 154 Ind. 673, 674, 57 N.E. 552, 554 (1900); or (3) the existence of a fiduciary duty not to disclose the information, see *E.I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917).

⁹ 41 F.R.D. 158 (E.D. Tenn. 1966).

¹⁰ See *id.* at 159.

¹¹ See *id.* at 159-60.

¹² 67 F.R.D. 40 (S.D.N.Y. 1975).

¹³ See *id.* at 48-49.

tinued protection of a deposition from dissemination.¹⁴ In *International Business Machines*, Chief Judge Edelstein acknowledged that the movant, relying on the common-law tradition of protecting trade secrets, came to court with an expectation that the secrets would be protected,¹⁵ and, as in *Textured Yarns*, the *International Business Machines* court ruled on the motion without acknowledging a constitutional expectation of privacy.¹⁶

Originally, an opposing party's expectations of use of commercial information obtained through the litigation process also were evaluated on a non-constitutional level.¹⁷ In *International Products Corp. v. Koons*,¹⁸ the Court of Appeals for the Second Circuit, in issuing an order to protect the deposition of a corporate officer in a libel action, discarded without discussion the appellant's contention that protective orders implicate constitutional rights in instances of disclosure of discovered information.¹⁹ In *Rodgers v. United States Steel Corp.*,²⁰ the Court of Appeals for the Third Circuit suggested that even if protective orders did implicate first amendment rights of dissemination, such rights were waived by the litigant's decision to enjoy the benefits of discovery.²¹

These earlier holdings can be contrasted with those of *In re Halkin*²² and *In re San Juan Star Co.*²³ The plaintiffs in *Halkin*, seeking relief for violation of their constitutional rights, alleged that they were being scrutinized by the CIA because of their involvement in lawful anti-war protest activities.²⁴ When the plaintiffs expressed their intention to disseminate certain discovered information, the government successfully moved for a protective order.²⁵ Reversing the trial court's decision to grant a protective

¹⁴ See *id.* at 42-43.

¹⁵ See *id.* at 45.

¹⁶ See *id.* at 42; *Textured Yarn*, 41 F.R.D. at 159.

¹⁷ See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976); *International Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963); *Textured Yarns Co. v. Burkart-Schier Chem. Co.*, 41 F.R.D. 158, 160 (E.D. Tenn. 1966).

¹⁸ 325 F.2d 403 (2d Cir. 1963).

¹⁹ See *id.* at 407.

²⁰ 536 F.2d 1001 (3d Cir. 1975).

²¹ See *id.* at 1006. Although *Koons* and *Rodgers* are recognized as the earliest attempts by litigants to engraft a constitutional analysis upon protective order litigation, it should be noted that neither case dealt with commercial information. See *Rodgers*, 536 F.2d at 1002-04; *Koons*, 325 F.2d at 404-05.

²² 598 F.2d 176 (D.C. Cir. 1979).

²³ 662 F.2d 108 (1st Cir. 1981).

²⁴ See 598 F.2d at 179-80.

²⁵ See *id.* at 180-82.

order, the Court of Appeals for the District of Columbia Circuit applied a complex constitutional analysis and concluded that protective orders, like prior restraints, trigger the strictest judicial scrutiny.²⁶

The Court of Appeals for the First Circuit chose a different approach from that of the *Halkin* court in *In re San Juan Star Co.*²⁷ The *San Juan Star* litigation arose from a series of terrorist activities in Puerto Rico.²⁸ The district court issued several protective orders to curtail possible prejudicial effects on the jury caused by the high degree of publicity the trial was receiving.²⁹ Ruling on a challenge to the protective order, the First Circuit concluded that only limited first amendment concerns were present in protective order litigation.³⁰ The *San Juan Star* court concluded that the prior restraint approach was inapposite and asserted that "the appropriate measure of [these] limitations [is] a standard of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake"³¹

*Tavoulareas v. Washington Post Co.*³² represented the first instance of collision between privacy and expression in the context of protective orders.³³ In *Tavoulareas*, Mobil Oil Corporation intervened in a libel action between William Tavoulareas, its president, and the Washington Post to protect confidential information that was ordered to be produced.³⁴ The district court lifted the seal on the documents,³⁵ but it was reinstated by the Court of Appeals for the District of Columbia Circuit.³⁶ The appellate court concluded that only a very limited right of free expression attached to discovered materials³⁷ and that right was insufficient to rebut Mobil's fourth-amendment-based corporate right of privacy.³⁸ The circuit court subsequently vacated and remanded the case for reconsidera-

²⁶ See *id.* at 183-96.

²⁷ 662 F.2d 108 (1st Cir. 1981).

²⁸ See *id.* at 110-11.

²⁹ *Id.* at 111.

³⁰ *Id.* at 113-14.

³¹ *Id.* at 116.

³² 724 F.2d 1010 (D.C. Cir.), *vacated*, 724 F.2d 1010 n.* (D.C. Cir. 1984).

³³ See 724 F.2d at 1017-29.

³⁴ *Id.* at 1012-15.

³⁵ *Id.* at 1013, 1015.

³⁶ *Id.* at 1029.

³⁷ *Id.* at 1025-29.

³⁸ *Id.* at 1029.

tion³⁹ in light of the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*.⁴⁰

Rhinehart represents an effort by the Supreme Court to clarify the confused precedent addressing the constitutional ramifications of protective orders.⁴¹ In *Rhinehart*, the leader of a religious organization, Keith Rhinehart, sued the *Seattle Times* for libel, and, during pretrial preparation, the newspaper sought discovery of confidential financial information from Rhinehart and his organization.⁴² The Supreme Court of Washington affirmed the trial court's decision to protect the information from dissemination.⁴³ Asserting that its first amendment rights had been violated, the *Seattle Times* petitioned for and was granted certiorari by the United States Supreme Court.⁴⁴ Writing for the Court, Justice Powell affirmed the state court decision,⁴⁵ concluding that a middle-level constitutional analysis should be applied to rule 26(c) motions.⁴⁶ The Supreme Court instructed lower courts reviewing protective order motions to "consider whether the 'practice in question [furthers] an important or substantial government interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'"⁴⁷

CORPORATE CONSTITUTIONAL PRIVACY: A MISCONCEPTION

The continuing expansion of corporate constitutional rights has often led to the conclusion that confidential commercial information is protected by a constitutional right of privacy.⁴⁸ Indeed, the *Tavoulaareas* court disregarded precedent⁴⁹ and equated a cor-

³⁹ *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010 n. * (D.C. Cir. 1984).

⁴⁰ 104 S. Ct. 2199 (1984).

⁴¹ See *id.* at 2205.

⁴² *Id.* at 2202-04.

⁴³ *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 258, 654 P.2d 673, 691 (1982).

⁴⁴ *Seattle Times Co. v. Rhinehart*, cert. granted, 104 S. Ct. 64 (1983).

⁴⁵ *Rhinehart*, 104 S. Ct. 2199, 2206-07 (1984).

⁴⁶ *Id.*

⁴⁷ *Id.* at 2207 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

⁴⁸ See *supra* notes 5 & 6.

⁴⁹ See *Nixon v. Administrator of General Services*, 433 U.S. 425, 455 (1977); *Whalen v. Roe*, 429 U.S. 589, 598-605 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 481-84 (1965). In *Tavoulaareas*, Judge Tamm first examined the constitutional right of privacy as set forth in *Whalen* and *Nixon*. See *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010, 1019 (D.C. Cir.), vacated, 724 F.2d 1010 n.* (D.C. Cir. 1984). The right of privacy is not specifically

poration's privacy expectations in confidential commercial information to an individual's expectation of protection from forced disclosure of personal information.⁵⁰ While the Supreme Court has previously recognized a corporate right of privacy, this right has not been deemed coextensive with the penumbral privacy rights enjoyed by individuals.⁵¹ Traditionally, corporate privacy expectations were based upon the search and seizure clause of the fourth amendment.⁵² While the fourth amendment right of privacy for

enumerated anywhere in the Constitution, but is a fundamental right based on a conglomeration of constitutional protections. See *Griswold*, 381 U.S. at 482; J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 458-61 (2d ed. 1983). Protection against invasions of "the sanctity of a man's home and the privacies of life" is provided by the first, fourth, and fifth amendments. *Boyd v. United States*, 116 U.S. 616, 630 (1885). Traditionally, this right has been perceived as exceptionally personal and individual, and has been conferred to prevent forced disclosure of personal information. See *Nixon*, 433 U.S. at 4357; *Whalen*, 429 U.S. at 599; *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981).

Constitutional privacy is rooted in human values and natural law. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 459; see also *Griswold*, 381 U.S. at 486 (right of privacy based on sanctity of marriage); R. STEVENSON, *CORPORATIONS AND INFORMATION—SECRECY, ACCESS AND DISCLOSURE* 51 (1980) (right of privacy grounded in human experience). It has been referred to as the right to be left alone. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); *Davis v. United States*, 328 U.S. 582, 587 (1946).

⁵⁰ See *Tavoulaareas*, 724 F.2d at 1019-21, 1023-24. The *Tavoulaareas* court concluded that the balancing test proposed in *Terry v. Ohio*, 392 U.S. 1, 21 (1968), would be the appropriate constitutional standard for determining the degree of permissible intrusion on corporate privacy, *Tavoulaareas*, 724 F.2d at 1022-23. The test formulated in *Terry* required "balancing the need to search . . . against the invasion which the search . . . entails." *Terry*, 392 U.S. at 21. In *Whalen v. Roe*, however, the Supreme Court limited the application of the *Terry* test to "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1977). The invasion in *Tavoulaareas* was not an affirmative invasion, but a "constructive search": a court order to produce, or allow dissemination of materials, which requires only proof that it is a reasonable exercise of a lawful power. Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 202 & n.28 (1946) (subpoena to produce document is constructive search). The analogy between individual privacy and corporate privacy made in *Tavoulaareas* is contrary to the weight of authority, which indicates that corporate expectations of privacy are severely limited. See *Bellis v. United States*, 417 U.S. 85, 92 (1974) (no substantial claim of privacy regarding records of collective entity); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 184 (1951) (Jackson, J., concurring) (right of privacy does not apply to profit-seeking organizations or corporations); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("corporations can claim no equality with individuals in the enjoyment of right to privacy"); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922) (fourteenth amendment does not confer corporate right of privacy).

⁵¹ See *supra* notes 49-50; *infra* note 61.

⁵² See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporations have fourth amendment right of privacy); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (corporations protected from unreasonable searches); *United States v. Hubbard*, 650 F.2d 293, 305-06 (D.C. Cir. 1980) (widespread acceptance of corporate privacy expectations under Constitution and state law); see also *United States v. Universal Mfg.*

corporations has been affirmed in some recent decisions,⁵³ it is suggested that an historical examination reveals that the policies underlying this right have ceased to exist.

The corporate fourth amendment right of privacy was an outgrowth of the doctrine of economic due process.⁵⁴ This doctrine was a 19th-century judicial response to Congress' failure to endow corporations with "constitutional personhood"⁵⁵ and served as the cornerstone upon which various corporate constitutional rights were erected.⁵⁶ The doctrine of economic due process, however, was

Co., 525 F.2d 808, 811-12, 812 n.3 (8th Cir. 1975) (unrestricted government access to corporate information is constitutional deprivation); *In re Lukich*, 335 F. Supp. 557, 558 (N.D. Ohio 1971) (corporations insulated from unreasonable searches and seizures); *Shultz v. Yeager*, 293 F. Supp. 794, 800 (D.N.J. 1967) (corporate records enjoy fourth amendment protection), *aff'd*, 403 F.2d 639 (3d Cir. 1968), *cert. denied*, 394 U.S. 691 (1969).

⁵³ See *First Nat'l Bank v. Belotti*, 435 U.S. 765, 778 & n. 14 (1978); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977), *cert. denied*, 435 U.S. 923 (1978).

⁵⁴ See Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1845-50 (1981). The economic due process doctrine stressed the importance of private ownership of property. *Id.* at 1847. The doctrine emphasized the freedom of the "person," and treated fictitious and natural persons almost identically. *Id.* at 1848. Such treatment allowed the courts to emphasize the freedom to contract, while focusing entirely upon the invading power of the states, and virtually ignoring the effects of corporate accumulation of power. *Id.* at 1848-49. As the doctrine of economic due process expanded, the Supreme Court was frequently required to determine to what extent democratic authority could interfere with private organizations. *Id.* at 1845-46. The difficulty created by the concept of "fictional personhood" became apparent when dealing with constitutional relationships. See Ratner, *Corporations and the Constitution*, 15 U.S.F.L. Rev. 11, 11 (1981). Individual and governmental units were the only types of entities mentioned in the Constitution; therefore the courts attempted to deal with corporate constitutional claims by constitutionally classifying the corporation. *Id.* at 11-12. The Supreme Court resolved this dilemma by relying upon the determination that corporations were "artificial beings" in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

⁵⁵ See, e.g., *Insurance Co. v. New Orleans*, 13 F. Cas. 67, 68 (C.C.D. La. 1870) (No. 7,052) (only natural persons can be constitutional persons); see also Graham, *An Innocent Abroad: The Constitutional Corporate "Person,"* 2 UCLA L. Rev. 155, 166 (1955) (that corporation not constitutional person was law of the land). During the Civil War period the number of corporations significantly increased and interstate activity flourished, particularly in the railroad and insurance industries. See Graham, *supra*, at 166. Faced with an inactive Congress and overactive state legislatures, the Supreme Court began to invalidate state actions that claimed corporate property without due process. *Id.* at 167. Thus, in 1880, the Court granted corporations fourteenth amendment protection from state actions perceived as injurious to the private ownership of property. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 395, 410 (1886). In *Santa Clara*, the Court refused even to hear an argument on the issue of corporate "constitutional personhood," and simply held categorically that corporations were entitled to constitutional protections. *Id.* at 396.

⁵⁶ See Graham, *supra* note 56, at 185-87; Ratner, *supra* note 55, at 15; Note, *supra* note 55, at 1835-36, 1847. In 1906, the corporate right of privacy under the fourth amendment was first recognized in *Hale v. Henkel*, 201 U.S. 43, 76 (1906). However, the *Hale* Court concluded that individuals acting in corporate form retained a right of privacy under the

abandoned when congressional regulation of economic activity increased in the 1930's.⁵⁷ In fact, by 1941 the Supreme Court had overruled most of the significant economic due process decisions.⁵⁸ In so doing, the Court failed to consider the status of a growing body of substantive corporate constitutional rights that were an outgrowth of the economic due process doctrine.⁵⁹ It is suggested that the privacy rights of individual corporate directors, officers, and shareholders are the only appropriate vestiges of this long discarded legal theory.⁶⁰ Unfortunately, recent decisions,⁶¹ and particularly the assertion that corporations have a constitutional right of

fourth amendment, not that the corporate personality itself had a fourth amendment right. See *id.* *Hale* adopted the association theory of corporations. See R. HESSEN, IN DEFENSE OF THE CORPORATION 40-42 (1979). In *Tavoulareas*, however, the court implied that the constitutional right of privacy is vested in the corporate person itself. See *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1023-24 (D.C. Cir.), *vacated*, 724 F.2d 1010, 1010 n.* (D.C. Cir. 1984).

⁵⁷ See, e.g., Federal Food, Drug, and Cosmetic Act, Pub. L. No. 717, 52 Stat. 1040 (1938) (codified at 21 U.S.C. §§ 301-392 (1982)); National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-166 (1976 & Supp. 1981)); Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 77b-77e, 77k, 77m, 77o, 78a-78o, 78o-3, 78p-78hh (1982)); Securities Act of 1933, Pub. L. No. 22, 48 Stat. 74 (1933) (codified at 15 U.S.C. §§ 77a-77aa (1982)); see also Note, *supra* note 55, at 1848 n.85.

⁵⁸ See, e.g., *Olsen v. Nebraska*, 313 U.S. 236, 244 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 350 (1928)); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)); *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); see also Note, *supra* note 55, at 1850-51 (from 1937 to 1941, Court abandoned central economic due process holdings of previous 50 years).

⁵⁹ See, e.g., *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937) (double jeopardy protection under fifth amendment); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (first amendment right of freedom of press); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (fourth amendment privacy rights). Unfortunately, no consistent principle emerged as the basis for granting or denying corporate constitutional rights. See O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 Geo. L.J. 1347, 1347-48 (1979).

⁶⁰ See H. HENN, HANDBOOK ON THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 25 (2d ed. 1970); R. HESSEN, *supra* note 57, at 41; Ratner, *supra* note 55, at 12-13. It has been deemed illogical and dangerous to bestow rights that are rooted in human values upon the corporate person. Ratner, *supra* note 55, at 29. Like all other types of organizations, the corporation draws qualities from its members and thus may draw upon the rights of its shareholders, officers, and directors, but it cannot claim that those rights personally vest within the corporate entity itself. See R. HESSEN, *supra* note 57, at 41-42.

⁶¹ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 766-83 (1978) (corporate speech); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 93-94 (1977) (corporate speech); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (double jeopardy). The corporate person was initially granted "constitutional personhood" in 1886. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886).

privacy,⁶² signal a partial rebirth of the doctrine of economic due process at a time when its protection is no longer needed.⁶³ The recognition of a limited corporate right of privacy creates a temptation to ignore the logical and historical inconsistencies underlying the doctrine.⁶⁴ Moreover, by embracing a corporate constitutional right of privacy the courts have ignored the existing state regulations that require corporations to disclose significant amounts of commercial information.⁶⁵ Since the constitutionality of these regulations has been repeatedly affirmed,⁶⁶ it is submitted that the continued recognition of the corporate constitutional right of privacy is logically inconsistent.

FIRST AMENDMENT EXPRESSION AND PROTECTIVE ORDERS

Acknowledgment of a litigant's first amendment right freely to express information obtained through discovery inevitably requires the trial court to perform an intricate and protracted constitu-

⁶² See *supra* note 5 and accompanying text.

⁶³ See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). The *Bellotti* rationale resembles the economic due process analysis to the extent that it ignores the disparity in private financial power between corporations and individuals through the use of the freedom to contract theory, see *id.* at 790, and disregards the difference between corporate and natural persons, see *id.* at 777-83; Note, *supra* note 55, at 1853-56.

⁶⁴ See *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1021-23 (D.C. Cir.) (corporate privacy not an absolute right), *vacated*, 724 F.2d 1010, 1010 n.* (D.C. Cir. 1984). Decisions considering the corporate right of privacy have concluded that it is not equal to the constitutional right of privacy afforded individuals. See *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65-66 (1974); *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950); *United States v. Stanack Sales Co.*, 387 F.2d 849, 852 n.9 (3d Cir. 1968).

⁶⁵ See *Ratner*, *supra* note 55, at 27. Many regulatory schemes require corporations to disclose substantial amounts of commercial information. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204 (1946); E. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 142 (1978). Due to the nature of their business activities, certain industries are subjected to more extensive regulation than others. See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970); *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976). Moreover, corporations cannot validly assert significant privacy expectations, *Oklahoma Press Publishing Co.*, 327 U.S. at 205, and they can expect substantially fewer privacy rights than individuals when they incorporate under the laws of a particular state, see *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1976); *Ratner*, *supra* note 55, at 22-23. To justify an intrusion on corporate privacy, the government need prove only that the regulatory statute is reasonably definite and is reasonably related to a valid investigatory purpose. *Civil Aeronautics Bd.*, 542 F.2d at 399; see E. BLOUSTEIN, *supra*, at 143. As a substantive constitutional right, however, the corporate right of privacy could only be overcome by a compelling, subordinating governmental interest. See *Ratner*, *supra* note 55, at 27.

⁶⁶ See, e.g., *Wright v. SEC*, 112 F.2d 89, 94-95 (2d Cir. 1940) (upholding constitutionality of Securities Exchange Act of 1934); *Oklahoma-Texas Trust v. SEC*, 100 F.2d 888, 890 (10th Cir. 1939) (upholding constitutionality of Securities Act of 1933).

tional analysis.⁶⁷ This right was found to be an unqualified right of free expression by the Court of Appeals for the District of Columbia Circuit in *In re Halkin*.⁶⁸ The *Rhinehart* decision, while acknowledging the existence of the right, refuted the *Halkin* proposition that freedom of expression is unqualified.⁶⁹ It is submitted that the acceptance of even a qualified right to express information obtained through discovery is both unnecessary and contrary to the basic policies underlying the Federal Rules of Civil Procedure. The Federal Rules predicate the issuance of a protective order upon a showing of good cause,⁷⁰ requiring the moving party to establish that dissemination would cause "annoyance, embarrassment, oppression, or undue burden or expense."⁷¹ The court may issue the order if a party can satisfactorily demonstrate that dissemination will result in one of these five occurrences.⁷² In light of the strong presumption of constitutionality attributed to the Federal Rules,⁷³ the moving party's establishment of one of the five

⁶⁷ See, e.g., *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1029 (D.C. Cir.), *vacated*, 724 F.2d 1010, 1010 n.* (D.C. Cir. 1984).

⁶⁸ 598 F.2d 176, 190 (D.C. Cir. 1979); see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (Constitution does not require that government make available to press information not shared with public; government has no affirmative duty to give out information not generally available); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (right to speak and publish does not include right to gather information). The *Halkin* court's acceptance of *Pell* and *Zemel* clearly indicates that there is no first amendment right to receive information through discovery. *Halkin*, 598 F.2d at 190. Although the right freely to express materials discovered was first raised by a media litigant, see *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 201 (S.D.N.Y. 1977) (defendant alleged protective order was violative of freedom of the press), the *Halkin* court indicated that such a right is generally available to all litigants, see *Halkin*, 598 F.2d at 191; see also Sinclair, *Protective Orders: How Much Protection Do They Really Offer?*, Nat'l L.J., Mar. 2, 1981, at 26, col. 2.

⁶⁹ See *Seattle Times Co. v. Rhinehart*, _____ U.S. _____, 104 S. Ct. 2199, 2206 (1984).

⁷⁰ FED. R. CIV. P. 26(c); see *supra* note 2.

⁷¹ FED. R. CIV. P. 26(c); see *supra* notes 1-3 and accompanying text.

⁷² FED. R. CIV. P. 26(c); see *supra* notes 1-3; see also *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 232, 654 P.2d 673, 677 (1982) (court is authorized to prohibit use of discovery information for unauthorized purposes upon establishment of one of five factors cited in rule 26(c)), *aff'd*, 104 S. Ct. 2199 (1984).

⁷³ See 28 U.S.C. § 2072 (1982). Section 2072 gives the Supreme Court the power to make rules and requires that the rules be reported to Congress for review. *Id.* The Supreme Court has upheld the federal rules as constitutional even when they have conflicted with state-created rights. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) (upholding rule 4(d)); *Mississippi Pub. Corp. v. Murphy*, 326 U.S. 438, 445-46 (1946) (upholding rule 4(f)); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (upholding rules 35 and 37), *modified*, 312 U.S. 655 (1941).

Indeed, all statutes are generally entitled to a presumption of constitutionality. 2A STATUTES AND STATUTORY CONSTRUCTION § 45.11, at 33 (L. Sands ed. 1973). The federal rules are no exception. See 3A STATUTES AND STATUTORY CONSTRUCTION, *supra*, § 67.10, at 236.

statutory bases for good cause should satisfy any constitutional implications that the drafters of the rules, the Supreme Court, or Congress anticipated would arise.⁷⁴

The *Halkin* court's superimposition of a complex first amendment analysis upon the good cause test implies that rule 26(c) is unconstitutional on its face.⁷⁵ Although *Rhinehart* narrows this implication by determining that protective order motions should not be reviewed under a traditional first amendment strict scrutiny analysis,⁷⁶ even the requirement of a middle-level balancing test, it is submitted, gives rise to an implication of unconstitutionality. It is suggested that such an implication is insufficient to rebut the strong presumption of constitutionality with which the federal rules are vested.⁷⁷ It is further suggested that a protective order, as well as the entire discovery process, involves a form of expression outside the scope of the first amendment.⁷⁸ If information obtained through discovery is deemed unprotected by first amendment guarantees, any limitation on the expression of such information

⁷⁴ See 28 U.S.C. § 2072 (1982). Any standard such as the good cause test that is incorporated into the federal rules at least must be presumed constitutional in that the Advisory Committee, the Supreme Court, and Congress have all given the rules a stamp of approval. See Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQUETTE L. REV. 159, 159 (1939). Originally, the good cause test was located in rule 30(b). FED. R. CIV. P. 30(b) (original 1938 version), reprinted in 1 F.R.D. at CI (1940). The good cause test, along with the other Federal Rules of Civil Procedure, was reviewed in hearings before the House and Senate Judiciary Committees and was not changed. See Hopkinson, *supra*, at 159.

⁷⁵ Cf. *In re Halkin*, 598 F.2d 176, 205 (D.C. Cir. 1979) (Wilkey, J., dissenting) (only good cause standard need be met to establish constitutionality of protective orders). Judge Wilkey concluded that the standard embodied in the federal rules is constitutional; good cause represents the constitutionally acceptable standard required for the issuance of a protective order. *Id.* at 206, 209 (Wilkey, J., dissenting). It is suggested that Judge Wilkey relied, *sub silentio*, upon the following syllogism: the federal rules are constitutional; the good cause test is part of the federal rules; therefore, the good cause test is constitutional.

⁷⁶ See *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2208 (1984).

⁷⁷ See *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965). In *Hanna*, the Supreme Court concluded that even statutory provisions that are only arguably procedural are entitled to a presumption of constitutionality. See *id.* at 472-73.

⁷⁸ See *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 258, 654 P.2d 673, 691 (Dolliver, J., concurring) (protective order review does not require first amendment analysis), *aff'd*, 104 S. Ct. 2199 (1984). Some types of speech have been found to be outside the purview of first amendment guarantees. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974) (certain libelous statements); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (lewd, obscene, and insulting language). But see *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2208 (1984) (discovered materials not one of typical categories of speech not protected by first amendment).

cannot be an unlawful prior restraint.⁷⁹ Indeed, Justices Douglas and Brennan, two of the strongest advocates of a broad interpretation of the first amendment, have indicated that a court's exercise of discretion to limit the use of discovered materials implicates no constitutional issues.⁸⁰

⁷⁹ Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) (punishment of unprotected speech not unconstitutional). Orders restraining extrajudicial comment in some instances have been found to be prior restraints. See, e.g., *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007-08 (3d Cir. 1976); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 204-05 (S.D.N.Y. 1977). However, some courts have held that no first amendment interests are infringed by protective orders. See, e.g., *International Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (no constitutional problem with respect to information obtained through depositions); see also Comment, *supra* note 1, at 773-74 (first amendment not violated by protective orders restricting dissemination of discovery information).

At common law, unreviewable administrative licensing or censorship programs that required certain types of information to be approved prior to publication were called prior restraints. Comment, *First Amendment—Federal Procedure—Dissemination of Discovery Materials is Constitutionally Protected*: In re Halkin, 55 NOTRE DAME LAW. 424, 426 (1980). The concept of prior restraints has since been expanded to include court orders that restrain speech and are unreviewable because of the collateral bar rule. See *Walker v. City of Birmingham*, 388 U.S. 307, 318-21 (1967) (contempt citation for violating court order cannot raise claim of constitutionality of order due to collateral bar rule).

Admittedly, protective orders do bear some similarity to prior restraints. First, violation of a protective order leads to a contempt proceeding, which, similar to a prior restraint, affords none of the procedural protections guaranteed in criminal prosecutions; second, both protective orders and prior restraints act upon specific individuals and increase the possibility of a chilling effect in the future; and, third, violation of either is a direct attack on the court's prestige, which often causes the court to augment the punishment in order to avenge the attack on its authority. See Comment, *Discovery and the First Amendment*, 21 WM. & MARY L. REV. 331, 343 (1979) [hereinafter cited as *Discovery*]. Even the middle-level constitutional scrutiny adopted by *Rhinehart*, however, will result in upholding the validity of protective orders under only the strictest of circumstances. Cf. Comment, *supra* note 1, at 785. Unfortunately, this undermines the purpose of protective orders, which is to serve as a "safeguard for the protection of parties . . . on account of the unlimited right of discovery given by rule 26." *Advisory Committee on Rules for Civil Procedure, Rules of Civil Procedure for the District Courts of the United States*, S. Doc. No. 101, 76th Cong., 1st Sess. 248 (1939) [hereinafter cited as *Committee on Rules*]. If discovered information can be classified as unprotected under the first amendment due to the circumstances under which it is received, see *Schenck v. United States*, 249 U.S. 47, 52 (1919), then restraining dissemination of such information would require only procedural protection, see Note, *supra* note 4, at 1652. In *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 (3d Cir. 1976), the Third Circuit took this approach by simply giving enough scrutiny to insure that protected speech was not restrained along with unprotected speech. See *id.*

⁸⁰ See *Reproductive Servs., Inc. v. Walker*, 439 U.S. 1307, 1309 (1978) (Brennan, J., in chambers) (stay entered on discovery order dissolved on condition that protective order be entered); *Chamber of Commerce v. Legal Aid Soc'y*, 423 U.S. 1309, 1312 (1975) (Douglas, J., in chambers) (refusal to reverse order compelling discovery because protective order had issued). But see *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984). (Brennan, J., concurring) (embracing court's determination that protective orders must be subjected to constitutional analysis).

The restraint imposed by judicially limiting the use of information obtained through discovery is no more severe than the restraint imposed by federal statutory schemes that protect confidential material from dissemination.⁸¹ Unlike gag orders, which completely foreclose a party from extrajudicial comment on pending litigation,⁸² a protective order permits a litigant to comment freely on his claim, and restricts only comment on information deemed confidential by the court.⁸³ The constitutionality of both federal privacy acts and gag orders has been upheld.⁸⁴ Although there is widespread acceptance of the right freely to express materials received through discovery,⁸⁵ it is suggested that the purposes of discovery and the court's inherent powers to control its own processes indicate that no such right should exist. It is further submitted that limiting discovery through protective orders is an act of internal judicial management that should not trigger an analysis of substantive rights.⁸⁶

⁸¹ See, e.g., Census Act, 13 U.S.C. §§ 8(c), 9(a), 214 (1982) (limiting dissemination of census information); Criminal Procedure Act, 18 U.S.C. § 1905 (1982) (criminal sanctions against government officers or employees releasing confidential data); Internal Revenue Code, 26 U.S.C. § 6103 (1982) (confidentiality of tax returns).

⁸² See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 542 (1976) (prohibiting any attending trial from releasing any information concerning testimony to public); cf. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 247-48 (7th Cir. 1975) (district court rules that prohibit attorneys from commenting publicly on pending litigation), *cert. denied*, 427 U.S. 912 (1976).

⁸³ See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976) (dictum). The *Rodgers* court dealt with a protective order that precluded dissemination of both discovered information and information acquired independently of the court's processes. *Id.* at 1006-07. The court did not pass on the discovered information, but ruled that restraint of independently acquired information was impermissible. *Id.* at 1009. The *Rodgers* court stated, in dictum, that any right to disseminate the discovered materials would be waived. *Id.* at 1006.

⁸⁴ See, e.g., *Baldrige v. Shapiro*, 455 U.S. 345 (1982); *United States v. Mangan*, 575 F.2d 32 (2d Cir. 1978), *cert. denied*, 439 U.S. 931 (1979); *United States v. Tangerina*, 412 F.2d 661 (10th Cir. 1969).

⁸⁵ See *Marcus*, *supra* note 1, at 1-2; *supra* note 4 and accompanying text.

⁸⁶ See, e.g., *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983) (within discretion of court to determine discovery suitable for circumstance); *United States v. Balistreri*, 606 F.2d 216, 221 (7th Cir. 1979) (court has authority to limit discovery), *cert. denied*, 446 U.S. 917 (1980); *Krekel Publications, Inc. v. Waukesha Freeman, Inc.*, 98 F.R.D. 745, 746 (E.D. Wis. 1983) (constraints on discovery are within discretion of trial court); see also *Dore*, *supra* note 1, at 8 (federal courts infer that imposition of reasonable constraints on use or accessibility of confidential information obtained through discovery is within judicial power). But cf. *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (procedural rules cannot ignore constitutional limitations). Even before the federal rules were adopted, courts possessed discretionary power to control dissemination of information involved in the judicial process. See, e.g., *E.I. Du Pont*

Prior to the *Rhinehart* decision, the Supreme Court had indicated that a court could restrain dissemination of information obtained through pretrial discovery if it were necessary to insure fairness to all parties under the circumstances.⁸⁷ The same considerations would appear to justify shielding discovered materials from a litigant's request for dissemination.⁸⁸ The broad discovery provisions of the federal rules are intended to enable litigants to prepare adequately for trial.⁸⁹ In fact, the only expectation of litigants that the drafters of the federal rules intended to foster was adequate trial preparation.⁹⁰

A litigant, therefore, cannot legitimately demand to receive discovered information since it is received as a privilege granted by the court.⁹¹ In its discretion, the court may limit or condition that

De Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917) (trial judge has discretion to regulate dissemination of trade secrets); *United States v. United Shoe Mach. Co.*, 198 F. 870, 875 (D. Mass. 1912) (court may regulate dissemination of information obtained by deposition). The Court of Appeals for the Second Circuit has held that the regulation of discovery is part of the management of the judicial process: "[W]e entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained . . . by use of the court's processes." *International Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963).

⁸⁷ See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n.21 (1981) (dictum) (courts often find it necessary to restrict free expression of participants during trial). In *Bernard*, the Supreme Court held that the district court abused its discretion by granting an order that restricted all communications between certain parties. *Id.* at 103-04. However, the *Bernard* decision did not resolve the question of the constitutional implications raised by a restraining order. *Id.*

⁸⁸ See *Committee on Rules*, *supra* note 79, at 248. Under the "fairness" approach, the party disclosing commercial information has an expectation of protection arising from rule 26(c), because the protection of commercial information has always been regarded as sufficient justification for the issuance of a protective order. See, e.g., *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969).

⁸⁹ See *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973); *Dienstag v. Bronsen*, 49 F.R.D. 327, 328-29 (S.D.N.Y. 1970); *Bocchino v. Witkowski*, 41 F.R.D. 535, 538 (W.D. Mich. 1966); see also *supra* note 1.

⁹⁰ See *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 234, 654 P.2d 673, 679 (1982) (effective administration of justice does not require dissemination beyond that which is necessary for trial), *aff'd*, 104 S. Ct. 2199 (1984). The expectations of the parties are rooted in the basic goals of discovery: to assist in raising testimony expected to be heard at trial, and to bring forth documents and other real evidence to be used at trial. *Montgomery*, *supra* note 1, at 346-47. Most litigants and judges have no expectation that discovered material can, will, or should be used for any purpose other than trial preparation. See *Marcus*, *supra* note 1, at 54-55.

⁹¹ See *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1979) (litigants get no right of access to information discovered but not generally available to public); see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (government has no duty to supply information not generally available to public); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (no unrestrained right to gather information). A privilege is defined as a "particular and peculiar benefit or advantage en-

privilege.⁹² While the conditional privilege approach may appear to conflict with the general principle that the right to express information exists regardless of the informational source,⁹³ the Supreme Court has concluded that when information is obtained through a government-conferred privilege, the use of such information may be constitutionally limited.⁹⁴

When considered in light of the tendency of judges to resolve motions for protective orders solely on the good cause test without reaching the constitutional questions,⁹⁵ the *Rhinehart* holding creates the impression that the right freely to express information obtained through discovery is of little consequence.⁹⁶ Indeed, as the

joyed by a person, company, or class, beyond the common advantages of other citizens." BLACK'S LAW DICTIONARY 1077 (5th ed. 1979); see *Knoll Golf Club v. United States*, 179 F. Supp. 377, 380 (D.N.J. 1959) (peculiar benefit not enjoyed by all). Rights, while varying in type and degree, are those powers shared equally among all members of society. See BLACK'S LAW DICTIONARY, *supra*, at 1189-90. Privileges are generally considered less indelible than rights and more susceptible to limitation and restriction. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-33 (1913).

⁹² Cf. *Snepp v. United States*, 444 U.S. 507, 510-12 (1980) (per curiam) (government conferring privilege of employment may restrict expression of matters related to it); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (government cannot demand complete waiver of first amendment right for privilege of employment but can diminish or condition such right). A court's restriction upon the use of discovered information may appear as conditioning a privilege on the waiver of a right, cf. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (conditional privilege may extract right), a practice that has been questioned, see *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (although state may grant privilege upon condition of waiving a right, it may not demand waiver of constitutional right). However, conditioning discovery upon a limitation of the use of the discovered materials does not involve a right-privilege waiver if one accepts the premise that discovered material is beyond the scope of first amendment protection. See *supra* note 78 and accompanying text.

⁹³ See *New York Times Co. v. United States*, 403 U.S. 713, 732 (1971) (White, J., concurring) (right to express not lost due to circumstances under which party obtained information). But see *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) (upon proper showing, first amendment may yield when there has been invasion of privacy).

⁹⁴ *Snepp v. United States*, 444 U.S. 507, 510-512 (1980) (per curiam). In *Snepp*, the defendant wrote a book detailing some of his experiences working for the CIA in South Vietnam. *Id.* at 507. An express agreement of his employment, however, was that he would not publish any information concerning his activities with the CIA without prior approval. *Id.* at 507-08. The government, seeking injunctive relief and an order imposing a constructive trust on the proceeds of the book, brought suit against *Snepp* for breach of contract. *Id.* at 508. The Supreme Court held that *Snepp's* breach of an employment condition "irreparably harmed the United States Government," *id.* at 513, and that a constructive trust should be imposed on the profits, *id.* at 516.

⁹⁵ See *Canal Author. v. Froehke*, 81 F.R.D. 609, 613 n.5 (M.D. Fla. 1979); *United States v. International Business Mach. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 409 (N.D.N.Y. 1973).

⁹⁶ See *In re Halkin*, 598 F.2d 176, 209 (D.C. Cir. 1979) (Wilkey, J., dissenting) (first

result in *Rhinehart* indicates, if the countervailing interests are strong, the right will succumb to them.⁹⁷ However, it is submitted that the mere recognition of a first amendment right to disseminate discovered materials burdens courts and contravenes the spirit of the federal rules.⁹⁸ Requiring a first amendment analysis hinders the "just, speedy, and inexpensive determination of every action"⁹⁹—the goal underlying the federal rules—because it draws the district court into a complex and time-consuming balancing process.¹⁰⁰ In addition, it is submitted that the interposition of a constitutional analysis increases the necessity for judicial intervention at the pretrial stage¹⁰¹ and focuses judicial attention away from the valid expectations of the litigants.¹⁰²

The litigant's right freely to express discovered materials threatens the use of stipulated protective orders.¹⁰³ Some decisions have implied that the right to express information obtained through discovery would outweigh even the use of purely consensual confidentiality agreements.¹⁰⁴ Limiting the use of protective

amendment analysis of protective orders is gratuitous); *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 258, 654 P.2d 673, 691 (1982) (Dolliver, J., concurring) (protective orders and discovery "do not require a first amendment analysis"); see also Comment, *The First Amendment Right to Disseminate Discovery Materials: In re Halkin*, 92 HARV. L. REV. 1550, 1553 (1979) (first amendment review is unwarranted).

⁹⁷ See *Rhinehart*, 104 S. Ct. at 2199. *Rhinehart* requires that a first amendment analysis must always be performed before a protective order can properly be issued. *Id.* In cases dealing with commercial information, such as *Tavoulareas*, the first amendment claims are likely to be minimal and the confidentiality interests great; therefore, the *Rhinehart* analysis would not appear to hinder the granting of a protective order. See Comment, *supra* note 79, at 434.

⁹⁸ Cf. *Rhinehart*, 98 Wash. 2d at 248, 654 P.2d at 685 (first amendment analysis unduly complex and onerous); see also Comment, *supra* note 96, at 1553 (federal rules give courts power to restrict use of materials subject to discovery).

⁹⁹ FED R. CIV. P. 1.

¹⁰⁰ See *supra* notes 4-6 and accompanying text.

¹⁰¹ Cf. Comment, *supra* note 1, at 768 (discovery should normally proceed with minimal judicial intervention). The *Rhinehart* test will also make stipulated protection agreements virtually impossible. Cf. *infra* notes 103-04 and accompanying text.

¹⁰² Compare *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2207 (1984) (complex first amendment analysis) and *In re Halkin*, 598 F.2d 176, 182-96 (D.C. Cir. 1979) (complex first amendment analysis) with *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310-12 (E.D. Pa. 1969) (simplified good cause approach). Constitutional analysis of protective orders wastes judicial time and increases litigation costs. See Marcus, *supra* note 1, at 2.

¹⁰³ Stipulated protective orders are agreements between litigants, bilateral in nature, in which each party receives corresponding rights of access and protection of disclosed materials. See Marcus, *supra* note 1, at 9; Sinclair, *supra* note 68, at 26, col. 1. Stipulated protective orders free the court and the parties from the necessity and expense of litigating confidentiality issues. Marcus, *supra* note 1, at 2.

¹⁰⁴ See *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir.) (contracts containing

orders will cause parties to assert various immunities and evidentiary privileges in order to secure confidentiality, thus increasing the need for substantive pretrial determinations.¹⁰⁵ It is suggested that the congressionally and judicially approved good cause test is sufficient to accommodate the various interests that arise in protective order litigation.

CONCLUSION

The Federal Rules of Civil Procedure have created an efficient and organized discovery system that functions as a crucial complement to the simple notice pleading used in the federal courts. Decisions that have interjected constitutional considerations into the discovery process threaten the efficiency and vitality of that process. This Note has proposed the abandonment of the doctrines of the litigant's first amendment right freely to express information obtained through discovery and the corporate constitutional right of privacy. It is possible justly to resolve rule 26(c)(7) motions without resorting to these troubling doctrines. To the extent that *Rhinehart* furthers these doctrines, it should be overruled. Whether the expectations of privacy of a corporation are valid should be determined based upon the common-law tradition of affording protection to commercial information when such protection does not impede the judicial process, rather than upon constitutional protections. These expectations should be balanced against the opposing party's practical, not constitutional, expectations of use. A litigant seeking to discover commercial information can validly assert only the expectation of use in connection with trial preparation. If a protective order is deemed necessary, and such an order would not impair the opposing party's expectation of use, then such an order could be issued.

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secrecy agreement invalid), *cert. denied*, 409 U.S. 1063 (1972); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir.) (agreement to refrain from publishing comments about party invalid), *cert. denied*, 373 U.S. 911 (1963).

¹⁰⁵ See Note, *supra* note 1, at 1036-38 (without protective order parties would assert privileges and immunities to prevent discovery). The assertion of evidentiary privileges would increase pretrial judicial intervention, delay pretrial proceedings, escalate expenses, and impair the goal of the federal rules—adequate trial preparation with knowledge of the facts. See *id.* at 1038.